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JOHN T. FEY, Cle

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 518

M. E. COLLINS,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1956.

No. ....

M. E. COLLINS,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX.

To the Honorable The Supreme Court of The United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above cause.

In this behalf, Petitioner shows unto the Court:

(The numbers in parentheses prefaced by the letter R. refer to page numbers in the record and appear at the bottom of each page.)

I.

OPINION OF THE COURT BELOW.

Atlantic Coast Line Railroad Company, Appellant vs. M. E. Collins, Appellee, is not yet reported (Appendix B.)

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Date of judgment to be reviewed, July 21, 1956, (R. 95), (Appendix B), as amended by Order Denying Rehearing, September 14, 1956, (R. 117), (Appendix C).

Stay of Mandate, September 18, 1956, (R. 118), (Appendix L).

Statutory provision believed to confer on this court jurisdiction to review the judgment in question. 28 U. S. Code, §1254 (1). (Appendix D.)

The rights, privileges and immunities here claimed arise under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, §§51-60.

III.

QUESTION PRESENTED.

The question for decision is whether or not there are probative facts in the record to support the finding of the

jury that there was negligence by the defendant which contributed, in whole or in part, to the injuries of Petitioner.

The District Judge, by overruling the Motion for Judgment N. O. V., held that there were.

The Court of Appeals held that there were not; that the defendant's Motion for Judgment N. O. V. should have been granted and reversed the judgment and remanded the case with directions to enter judgment in defendant's favor. (R. 103.)

(1) In the course of a normal switching operation performed in the customary manner, petitioner sustained painful injuries because of the unusual strain placed upon him when the switch petitioner was to throw or turn (R. 6-7), because of a defect or insufficiency in the switch, due to defendant's negligence, suddenly while being operated or thrown in the normal and usual manner, locked and stuck fast. Could the jury have found under this evidence that there was a defect or insufficiency due to the defendant's negligence in the switch which contributed in whole or in part to the injuries; or

(2) Given the facts related above, could the jury have inferred from the evidence that the railroad company was negligent in failing to furnish petitioner with a reasonably safe place to work and safe appliances with which to perform his labor when it allowed the switch to become and remain stiff and hard to throw so that when petitioner attempted to throw or turn the same in the

normal, usual and customary manner it suddenly hung up, locked and stuck fast causing petitioner to sustain serious injuries because of the unusual strain placed upon him when the switch locked?

IV.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, §1254 (1) (Appendix D), Page 31.
45 U. S. Code, §51, (Appendix E), Page 32.
45 U. S. Code, §53, (Appendix F), Page 33.
45 U. S. Code, §54, (Appendix G), Page 34.
45 U. S. Code, §56, (Appendix H), Page 35.

V.

STATEMENT.

(a)

The Material Facts.

This action was brought in the United States District Court for the Eastern District of South Carolina, Columbia Division, by Petitioner, an employee of Respondent, under the Federal Employers' Liability Act, (45 U. S. Code §§51-60), to recover damages on account of personal injuries suffered by him on September 27, 1954, as a result of the alleged negligence of Respondent.

Plaintiff, on September 27, 1954, was in the employ of the defendant as a member of a switch crew engaged in

switching cars in the railroad yards at Florence, South Carolina; during the course of his duties it became necessary for plaintiff to turn or throw a certain switch to the lead track in defendant's yards. While so engaged, because of a defect or insufficiency due to defendant's negligence in its equipment, to-wit, a switch, plaintiff received certain injuries which he alleged were directly and proximately caused by the negligence of the railroad company in that it allowed the switch to become and remain stiff and hard to throw. When plaintiff attempted to throw or turn the switch in the normal, usual and customary manner by pulling on the handle or lever of the same, the switch suddenly locked and stuck fast and by reason thereof the railroad company failed to furnish plaintiff a reasonably safe place in which to work.

In addition to plaintiff, the switch crew consisted of Foreman C. L. Bigelow and Switchman L. E. Oakley. Plaintiff had been in the employ of the railroad company approximately four (4) years as a switchman prior to the date of his injuries. It was necessary in the course of plaintiff's duties for plaintiff to use the main line switch in the assorting of the cars his engine was handling at the time. It was necessary that the switch be turned or thrown in the classification of the cars that the engine was coupled to. Normally, a switch could be thrown or turned with one hand. In other words, you could start it off and turn it loose and it would go. (R. 7.) The weight of the ball carries it over after it has been raised past a vertical position.

It was shown that the switch was under the exclusive control of defendant; (R. 7) that the switch was supposed to be oiled or lubricated but it was not plaintiff's job to oil or lubricate it. (R. 7.) The switch was hard to throw or turn but he had never had one to stop or hang up on him like this one did (R. 16) at the time he was injured. The switch was tight all the way. The manner of operating the switch was described by plaintiff (R. 6) by stating that he was going to throw the ball and line the track so the cars could go down the line. He unlatched the ball with his foot. He stepped on it to unlatch it and reached for the ball and as he pulled it up 8 or 10 inches *it froze more or less. . . . It stopped.* He set his lantern down on the crossties to which the switch was attached and got both hands on the ball and pulled up on it to bring it up in a 90° angle. He then expected to put his foot on it and shove it down and lock it. *Just as he straightened up the switch hung up, locked and stopped and he fell at the switch doubled up;* he never did get the switch over all the way, it stopped in a perpendicular position. That was not the normal way for a switch to work. (R. 7.) In comparing it with other switches, it was harder to throw and the reason for this was lack of lubrication.

Petitioner was corroborated by another switchman, T. J. Neal, in the manner in which the switch could be thrown. He testified (R. 17) *that he had occasion to operate the switch in question prior to September 27, 1954, and since that time.* That the switch was hard to throw; *that it was harder to throw than other switches. He gave as possible reasons for it being hard to throw a*

lack of lubrication or the fact that it might have been under pressure, or other causes. (R. 18-19.) Further corroborating Collins in his explanation, Neal testified *that he had actually operated the switch in question approximately fifteen (15) days prior to the time Collins was injured and had found it stiff.* (R. 24.) *That a switch that is hard to throw is never reported as defective unless it practically breaks his back. That the switch in question was harder to operate than some others;* (R. 29) *that he knew of no other switches in the yard that were harder to operate.* (R. 29.) The switch in question was unusually hard to operate. Counsel for the railroad, though not admitting a defect in the switch, did admit that "It might be a little hard to work". (R. 29.)

Collins testified (R. 56) *that graphite was generally used to lubricate the switch and that he could tell if graphite had been put on it, not by seeing the graphite because the graphite was placed inside the switch, but that he could tell if it had been graphited by throwing the switch itself; but that no graphite had been put on the switch for a month prior to the time he was injured.*

The other members of the switch crew corroborated Collins as to the stiffness of the switch and its being hard to throw. Switchman Oakley testified that the switch was hard to throw to the right but he did not know why, but that it was not customary for them to be harder to throw one way than to throw the other way. (R. 35.) Conductor Bigelow testified (R. 45) *that the switch was hard to throw and that the question of switches being hard to throw had been discussed in*

Safety Meetings for a year or longer prior to the time Collins was injured and that there were other switches in the yard just as hard to throw as the switch in question. *Defendant's witness, W. K. Eaton, also testified* (R. 50) *that he had heard complaint in Safety Meetings about switches in the yard being hard to throw.*

Another witness for Respondent who personally did not oil or put any graphite on the switch and did none of the work himself, testified that the switch was not hard to throw; that he examined the same the night Collins was injured; *that weekly inspections were made by the section crews but he was not present when any of the inspections were made; merely saw reports.* (R. 87.)

It is undisputed in the record of this case that:

(1) The railroad had knowledge of the stiff condition of the switches in the Florence Yard (the condition of the switches having been discussed in Safety Meetings for as long as one year prior to the time plaintiff was injured. (R. 38-50.)

(2) That the switch was hard to throw (there was variance in the testimony of the witnesses as to the degree of stiffness).

(3) That the switch locked up or froze when attempt was made by Collins to throw the same on the night in question.

(4) That plaintiff, Collins, on the night in question while at the switch in question, sustained an injury to his back.

With the above statement of facts *the jury was left with the problem of weighing the conflicting evidence and judging the credibility of the witnesses* and deciding whether or not the railroad was guilty of *any* negligence which *"in whole or in part"* caused or contributed to the injury sustained by Collins. *The jury resolved these questions in plaintiff's favor by their verdict* for the plaintiff in the sum of $17,625.00. Judgment entered thereon (Appendix A).

At the close of all the evidence, Respondent moved for a directed verdict on the ground that there had been no showing of negligence on the part of the railroad. The Court overruled the motion and submitted the case to the jury and after the verdict of the jury judgment was entered thereon. (R. 65.) Motion for Judgment N. O. V. was denied, but on appeal to the United States Court of Appeals for the Fourth Circuit, this judgment was reversed and the case was remanded with directions to enter judgment in favor of the defendant railroad. (R. 103.) Petition for Rehearing was denied (R. 117), and Stay of Mandate pending application for this writ was granted. (R. 118.)

(b)

Basis for Federal Jurisdiction in District Court.

Jurisdiction in the District Court, the court of first instance, was based upon the provisions of 45 U. S. Code, §56, (Appendix H).

VI.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In recent years this Court has had occasion, in many instances, to express itself regarding the respective functions of the Court and jury, and the scope of appellate review in cases arising under the Federal Employers' Liability Act. The basic decisions are collected and set forth in *Louisville & Nashville R. Co. v. Botts*, 173 F. (2d) 164, 167, (CCA 8, 1949), to-wit:

> *Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 58, 63 S. Ct. 444, 451, footnote 30, 87 L. Ed. 610, 143 A.L.R. 967;*
> *Bailey v. Central Vt. R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;*
> *Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520;*
> *Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916;*
> *Wilkerson v. McCarthy, 69 S. Ct. 413, 417, 418.*

To which may be added the cases of:

> *Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572;*
> *Schulz v. Pa. R. R. Co., 76 S. Ct. 608 (Decided April 9, 1956);*
> *Jesionowski v. B. & M. R. Co., 67 S. Ct. 401, 91 L. Ed. 416;*
> *Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683.*

The decision of the court below is in direct conflict with the principles of law announced by this Court in the above cases on the question of when a case arising under the Federal Employers' Liability Act *raises a question to be passed on by a jury.*

To these decisions may be added the cases of:

Stone v. N. Y. C. & St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441;
Carter v. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236;
Coray v. Sou. Pac. Co., 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208.

The decision herein complained of is in conflict with the decisions of this Court in the latter cases on the question of proximate cause.

Thus it seems clear that if there are evidentiary facts which, as a matter of law, constitute negligence, the jury's verdict and the District Court's denial of judgment notwithstanding the verdict should not be reversed on appeal by the appellate judges substituting their opinion of the facts and the credibility of the witnesses for that of the jury who saw the witnesses on the witness stand, heard their testimony and *decided the conflict in the testimony in petitioner's favor.*

The decision in the case at bar is also in conflict with and contrary to numerous decisions of the various Circuit Courts of Appeal of the United States so far as the

respective functions of a court and jury are concerned. These cases are too numerous to mention, but see:

Stafford v. Pa. R. Co., 171 F. (2d) 632 (CCA 7);
Chicago, G. W. Ry. Co. v. Smith, 228 F. (2d) 180 (1), (2), (6), (CCA 8);
Chicago, R. & P. R. Co. v. Gill, 217 F. (2d) 195 (CCA 5);
O'Day v. Chi. R. & I. R. Co., 216 F. (2d) 79 (CCA 7);
Chi. M. & St. P. R. Co. v. Lineham, 66 F. (2d) 373 (9), (10), (CCA 8);
Chicago, G. W. R. Co. v. Smith, 228 F. (2d) 189 (CCA 8);
Stewart v. Balt. & O. R. Co., 137 F. (2d) 527 (CCA 2);

The Court's decision in this case is also contrary to and in conflict with numerous decisions of the courts of last resort of several States in the Union on the identical point.

Ballenger v. Southern Rwy. Co., 90 S. E. 1019, (106 S. C. 200);
St. Louis & S. F. Ry. Co. v. Dyson, 43 Sou. (2d) 95, (207 Miss. 639).

The decision in this case is contrary to and in conflict with the case of *Brown v. Western Railway of Alabama*, 70 S. Ct. 105, 338 U. S. 294, on the question of the decisions in actions under the Federal Employers' Liability Act being uniform throughout the forty-eight States.

On the facts, Collins' conduct in attempting to turn or throw a switch which he knew was hard to throw amounted to no more than contributory negligence.

Thus it seems clear that if there are evidentiary facts which, as a matter of law, constitute negligence, the jury's verdict and the District Court's denial of Motion for Judgment N. O. V. should not be reversed on appeal by a ruling converting contributory negligence into no negligence.

In this case the evidence shows that when petitioner attempted to turn or throw the switch it should not have hung up and stopped as it did. (R. 7.) No one knew why it did hang up or stop. There were various reasons given as to why it did hang up or stop. (R. 18, 19.) It was not necessary to prove to a certainty the specific cause.

The Court of Appeals held that Petitioner failed to show negligence on the part of Respondent. That the railroad had no notice of the defective switch as same *had not been reported to the company prior to Collins' injury.* The opinion of the Court of Appeals is therefore grounded in two premises: First, that Petitioner made no complaint to the Respondent regarding the condition of the switch, and Second, that the switch had been operated on the same evening Petitioner was injured, both before and after the injury.

Whether the first premise is, in turn, grounded in the theory of assumption of risk or lack of notice to the Respondent is not stated. Presumably the latter since the 1939 Amendment to the Federal Employers' Liability Act (45 U. S. C. A., §54) "obliterated every vestige of the doctrine of assumption of risk in Federal Employers'

Liability Act cases". And as to notice, the Respondent's witness, Mr. Bigelow, who was Yard Foreman, and W. K. Eaton testified (R. 45-50) that *prior to the injury to Collins, complaints had been made at Safety Meetings that switches in the Florence, South Carolina Yards were "hard to throw". Under such circumstances, the Respondent had notice of the defective switch* and we submit that the court below erred in holding that Respondent had no knowledge of the defective condition of the switch.

Even if we assume that the company had no notice of the condition of the switch in question, the opinion of the court below is contrary to the court's holding in the case of *Cereste v. New York N. H. & H. R. Co.*, 231 F. (2d) 50, (CCA 2). In that case the appellate court held that it was not error to allow evidence to the effect that the conditions of the yards in general with reference to the presence of coal therein and its dangerous propensities as throwing light on the character of the company for keeping its premises safe for use by workmen and for the purpose of showing that the company would have constructive notice of the condition of the specific place in its yards where plaintiff sustained his injury. *The fact that the condition of the yards had been taken up in Safety Meetings several years before plaintiff's injury was sufficient to put the railroad on notice of the condition of the yards.* The evidence in the *Cereste* case has a great similarity to the evidence in the case at bar *wherein the condition of the switches in the Florence Yard had been discussed at Safety Meetings within a year prior to the time Collins sustained his injuries on a switch.* Further

in the *Cereste* case the court held that the railroad did have constructive notice of the condition of the premises by reason of having complete and exclusive control over its yards (as in the case at Bar). (R. 7.)

With respect to the second premise, the opinion below of the Court of Appeals cites *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615, and recognizes the rule adopted therein that

> "Where a jury finds there is a violation (of the statute) it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question."

In a footnote (Opinion, P. 7, R. 101) the opinion distinguished the *Myers* case, *supra*, from the case at Bar by saying that Myers' suit was brought under the Safety Appliance Act, 45 U. S. C. A., §11, whereas Collins' suit is under the Federal Employers' Liability Act (45 U. S. C. A., §§51-60).

We submit that the decisions of this Court permit no such distinction as to bring about such a difference in result. The decision in the case at Bar is in conflict with the opinion of this Court of *San Antonio & Arkansas Pass. Ry. Co. v. Wagner*, 241 U. S. 476, 484, 60 L. Ed. 1110, 36 S. Ct. 626 (1915), holding that the question of negligence in the general sense of want of care is immaterial, but the two statutes (Federal Employers' Liability Act and Safety Appliance Act) are in pari materia and where the Employers' Liability Act refers to 'any defect or in-

sufficiency due to its negligence, in its cars, engines, appliances,' etc., it clearly was the legislative intent to treat a violation of the Safety Appliance Act as 'negligence', and *Urie v. Thompson*, 337 U. S. 163, 188, 93 L. Ed. 1282, 69 S. C. 1018 (1948), on its interpretation of the law under which the case was tried.

In effect, the Court below has held that the character and sufficiency of proof of negligence required in a Federal Employers' Liability Act case, Title 45, Section 51, U. S. Code, is different from such proof required in a Safety Appliance Act case. This is an important point in the administration of the Acts and one which, we feel, is contrary to the *Wagner* and *Urie* cases, *supra*.

It is the contention of petitioner here, as it was below, that the Respondent was guilty of negligence which contributed, *in whole or in part*, to Petitioner's injuries.

It is, therefore, respectfully submitted that the court below by substituting its view of the case for that of the jury invaded the province of the jury contrary to the right of Petitioner under the Seventh Amendment to the Constitution of the United States and decisions of this Court and various decisions of the United States Courts of Appeals above cited.

PRAYER.

For the reasons given, Petitioner prays for a Writ of Certiorari directed to the Court of Appeals for the

Fourth Circuit to the end that the judgment of that Court may be reviewed by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

THOMAS J. LEWIS, JR.,
Attorney for Petitioner,
909 Healey Building,
Atlanta 3, Georgia.

THOMAS J. LEWIS,
ROBERT K. WISE,
Of Counsel.

CERTIFICATE OF SERVICE.

This is to certify that I have this day served Mr. Douglas McKay and Messrs. McKay, McKay, Black & Walker, Attorneys for Respondent, Barringer Building, Columbia, South Carolina, with a copy of this Petition for Writ of Certiorari and Appendix in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This the .... day of October, 1956.

.....
Attorney for Petitioner.

APPENDIX.

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APPENDIX A.

**IN THE DISTRICT COURT,
UNITED STATES OF AMERICA,
EASTERN DISTRICT OF SOUTH CAROLINA.**

M. E. COLLINS,

Plaintiff,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant.

JUDGMENT BY THE COURT OR JURY.

Filed March 14, 1956.

Civil Action No. 4842.

Judgment Roll No. 3963.

THIS ACTION having been brought to trial at a District Court held on the 12th day of March, A. D. 1956, and a verdict for the plaintiff having been rendered there in by the JURY for the sum of Seventeen Thousand Six Hundred Twenty-five and No/100 ($17,625.00) Dollars, and the costs having been adjudged at (to be taxed later) Dollars;

NOW, on motion of R. K. Wise, Esq. and Messrs. Lewis & Lewis, Attorneys for said Plaintiff

IT IS ADJUDGED that M. E. Collins recover of said Atlantic Coast Line Railroad Company, Seventeen Thousand Six Hundred Twenty-five and No/100 ($17,625.00) Dollars, so found, with (to be taxed later) Dollars, costs.

R. K. WISE, Esq.
and
Messrs. LEWIS & LEWIS,
Plaintiff's Attorneys,
ERNEST L. ALLEN,
(Ernest L. Allen),
C., U.S.D.C., E. Dist. S.C.

(Seal)

APPENDIX B.

OPINION.

Filed July 21, 1956.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 7218.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

versus

M. E. COLLINS,
Appellee.

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia.

(Argued June 12, 1956. Decided July 21, 1956.)

Before SOPER, Circuit Judge, and BARKSDALE and BRYAN, District Judges.

Douglas McKay and Julius Walker McKay (E. Ellison Walker, and McKay, McKay, Black & Walker on brief) for Appellant, and Thomas J. Lewis and R. K. Wise (Thomas J. Lewis, Jr., and Lewis & Lewis on brief) for Appellee.

SOPER, Circuit Judge:

This suit under the Federal Employers' Liability Act was brought by M. E. Collins, a switchman in the employ

of the Atlantic Coast Line Railroad Company, to recover damages for injuries to his back which he suffered while throwing a switch on the evening of September 27, 1954, in the railroad yard at Florence, South Carolina. He experienced a sharp pain in his back, fell to the ground, and was taken to a hospital where he stayed eleven days and was attended by railroad physicians. Since that time he has been given various treatments, he has worn a brace, and an operation has been suggested but has not been performed. There seems to be trouble with a disc in the lumbar region between the fourth and fifth vertebrae, and although his condition was somewhat improved at the time of the trial on March 12, 1956, he still suffers some pain and has been unable to return to railroad work. On submission to the jury a verdict was rendered in his favor of $17,625.00.

The case comes before this Court on appeal from the refusal of the District Judge to direct a verdict in the defendant's favor, and his refusal after verdict to enter judgment for the defendant *non obstante veredicto*. The sole question is whether there was sufficient evidence of negligence on the part of the railroad company to take the case to the jury. Collins was a young man, 28 years of age. He had been in the service of the railroad company since January 4, 1951, and had spent most of the time as a switchman in the Florence yard. He went to work in the yard at 4:00 P.M. on the day of the accident and was stricken at 7:00 P.M. when he was endeavoring to operate the main lead switch. This device was of the standard type customarily used by railroads and consisted of a strong iron bar or lever, to the end of which was attached a heavy ball or

oblong weight which rested on the ground when the switch was in position. To operate the switch the lever is moved to either side and is firmly latched under some tension in the horizontal position so as to maintain the tracks in place. To perform the operation it is customary to disengage the latch on one side with the foot, so that the tension is released and the lever rises a few inches from the ground, and then to lift the lever to a vertical position by hand and push it down to a horizontal position on the other side and latch it with the foot. Thereby the pointed rails of the switch, or "switch points" as they are called, are moved into the desired position and held against the railroad track under tension. During this switching operation the switch points move over plates which are lubricated with graphite to facilitate their movement.

Collins testified that it was his purpose at the time of the injury to release the switch lever, which was latched on the left side, and move it from left to right; and that after releasing it with his left foot he took hold of the ball with one hand and raised it to a height of 8 or 10 inches from the ground when it "frost more or less . . . it stopped". He then placed his lantern on the ground and using both hands tried to bring the lever to a vertical position, but just as he straightened up it stopped and he was struck with a stabbing pain in the back and fell to the ground. His fellow workmen observed him and came to his aid. When he fell the lever was in the upright position and the switch points were still open and he told his colleagues to lock the switch because the engineer of the train was waiting, and they did so in his presence. "He also testified that on the same evening he had previously

operated the same switch a dozen times before 4:00 and 7:00 o'clock, seemingly without difficulty."

The whole case for the plaintiff is based upon his testimony that on the occasion of the injury the switch was hard to operate. The only other witness on his behalf as to the operation of the switch testified that he was off duty on the night of the injury but that before and after September 27 he had operated the same switch and found that it "throws harder" than other switches in one direction, especially in latching it; and he enumerated a number of things that might have caused this condition including lack of lubrication, the fouling of the cogs inside the housing, sand on the plates on which the points slide or the fouling of the rod that runs from the lever to the points themselves. However, the witness added that there were other switches which were hard to operate and that he had never reported the switch in question; and no evidence was offered to show that any of the conditions enumerated by him as possible causes actually existed at the time of the injury. Nor was any explanation offered as to the testimony of the plaintiff himself that he had operated the same switch successfully on a dozen previous occasions that night, and that his colleagues completed the throwing of the switch in his presence after the injury.

The uncontradicted evidence on the part of the defendant was that the switch in question was a key switch in the yard and that it was operated more than fifty times a day; and that it was successfully thrown fifteen times or more the same night without change by other switchmen

between 7:00 and 12:00 P.M. after the plaintiff was injured. There was also evidence that this particular switch was examined by the roadmaster the same night about 10:00 P.M. after the accident and he found that it moved easily in either direction. It was also shown without dispute that no two switches are exactly alike in operation; and that every week all the switches in the yard were checked and lubricated by a section force of four or five men in charge of a foreman and that this particular switch was examined and lubricated and found to be in good condition the Friday previous to the Monday when the accident occurred.

Upon consideration of the whole evidence it cannot be said that the plaintiff has offered sufficient testimony to show that his injuries were caused by the railroad's neglect. His contention is that conflicts in the evidence required the submission of the case to the jury. There are, however, no conflicts upon the essential points in the inquiry. Minor discrepancies are found as to whether the switch worked easily in both directions or was harder to throw or latch in one direction than in the other; but, as we have seen, there is no dispute that the switch was operable by switchmen of like experience and skill and was actually operated on the same evening, both before and after the injury occurred.

In the last analysis the plaintiff's case rests upon the contention that negligence on the part of the railroad company must be inferred from the mere happening of the incident. He says in effect, that since it was so hard to lift the lever of the switch to the upright position that he

hurt his back, the switch mechanism must have been defective, and the railroad company was negligent in furnishing it. But this simple statement leaves out of account other material features of the evidence on his behalf which must be taken into consideration. He also showed that the switch was operated many times each day, that he himself had operated it a dozen times on the night that he was hurt*; and that neither he nor his companion, who had operated it on previous occasions and found it harder to use than some other switches, had ever complained of its condition to their superiors. This testimony taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man; but speculation is not enough. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inference favoring the party whose case is attacked." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 32.

Moreover, there is a complete lack of any evidence to show that the mechanism, which had been in constant and effective use, had been reported to the company as defective previous to the injury. Actual or constructive notice that a sufficient piece of equipment has become defective or dangerous through use must be shown to establish negligence on the part of the employer before an injured

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* The testimony of the plaintiff that the switch was operable for several hours before he was hurt is in accord with testimony of defendant's witnesses that the switch was operable for several hours after the accident. This agreement in the testimony was not found in *Chicago, M., St. P. & P. R.R. Co. v. Linehan*, 8 Cir., 66 F.2d 373, upon which appellee relies.

employee can recover damages. See the very similar case of injury suffered during the operation of a railroad switch in *Spencer v. A. T. & S. F. Ry. Co.*, 92 Cal. App. 2d, 490.

The general rule as to the probative evidence to be applied in cases under the Employers' Liability Act is set out in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."*

The case is stronger for the railroad company if the doctrine of *res ipsa loquitur* is applied and if the uncontradicted explanatory evidence offered by the railroad company is taken into account, as we think it may be in this case. That evidence shows that the switch worked

* It should be noted that the present suit is based upon the provisions of 45 U.S.C. §51 making carriers by railroad liable for injuries to employees resulting from the negligence of the carrier and is not brought under the Safety Appliance Section, 45 U.S.C. §11, where an injured employee may recover by proving injury from a defective appliance without proof of negligence on the part of the carrier. *Myers v. Reading Co.*, 331 U.S. 477.

perfectly on the same evening after the plaintiff was injured, and that it was regularly inspected and lubricated, and that no defects in the switch had been reported. In view of this undisputed testimony, it is plain that there was no reasonable basis for the submission of the question to the jury. The rule in such cases is well stated in *Baltimore & O. R. Co. v. O'Neill*, 6 Cir., 211 F.2d 190, 194:

> "Under the rule the burden of proof does not shift from the plaintiff to the defendant, and if the plaintiff offers no evidence pertaining to the issue of negligence other than the facts of the occurrence of the injury, and the explanatory facts are sufficient to rebut the inference, the plaintiff fails to meet the burden and fails to make a case. Sweeney v. Erving, supra, 228 U.S. at page 241, 33 S.Ct. at page 418. Where the explanatory evidence is contradictory or of such a character as to justify different inferences as to the defendant's exercise of due care, it is for the jury to determine whether the inference of negligence has been rebutted by the explanatory evidence. But where the possible inference of negligence is clearly overcome by undisputed evidence free from any reasonable adverse inference, or where the uncontradicted explanatory facts establish nonliability as a matter of law, it is the duty of the Court to direct a verdict for the defendant. The application of the rule does not change the general rule that where the evidence as a whole is insufficient to support a verdict for the plaintiff, defendant's motion for a directed verdict should be sustained."

See also *Wadiak v. Illinois Cent. R. Co.*, 7 Cir., 208 F.2d 925; *Terminal R. Assn. of St. Louis v. Staengel*, 8 Cir., 122 F.2d 271.

The judgment of the District Court will be reversed and the case remanded with directions to enter judgment in favor of the defendant.

Reversed and remanded.

APPENDIX C.

ORDER DENYING REHEARING.

Filed and Entered September 14, 1956.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 7218.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

versus

M. E. COLLINS,
Appellee.

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia.

This Court having at its June term, 1956, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on August 8, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered:

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

MORRIS A. SOPER,
United States Circuit Judge.
A. D. BARKSDALE,
United States District Judge.
ALBERT V. BRYAN,
United States District Judge.

September 17, 1956, petition of appellee for a stay of mandate pending petition for a writ of certiorari filed.

APPENDIX D.

COURTS OF APPEALS; CERTIORARI.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. Code Sec. 1254 (1).

APPENDIX E.

THE FEDERAL EMPLOYERS' LIABILITY ACT.

Every common carrier by railroad while engaging in commerce between any of the several States . . . or between the District of Columbia and any of the States . . or between the District of Columbia or any of the States and any foreign nation or nations, shall be liable in damages to any person suffering injury, while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 51.

APPENDIX F.

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66, 45 U. S. Code, Sec. 53.

APPENDIX G.

ASSUMPTION OF RISKS OF EMPLOYMENT.

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 54.

APPENDIX H.

ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989, 45 U. S. Code, Sec. 56.

APPENDIX I.

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI.

Filed September 19, 1956.

(Style of Court and Title Omitted.)

Upon the application of the appellee, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 45 days from this date.

September 18, 1956.

MORRIS A. SOPER,
United States Circuit Judge.

September 25, 1956, supplemental appendix to brief of appellee filed.

Supreme Court of the United States

October Term, 1959

No. 518

M. E. COLLINS,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1956

No.....

M. E. COLLINS,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

Atlantic Coast Line Railroad Company, Appellant v. *M. E. Collins, Appellee,* 235 F. 2d 805 (CA 4th, 1956).

II.

JURISDICTION

The jurisdiction of this Court is not controverted. It is, however, submitted that the reasons enumerated in Rule 19 1(b) of the Revised Rules of this Court as sufficient to warrant consideration of Petition for Certiorari are not applicable to the matters presented by this Petition.

III.

QUESTION PRESENTED

Is there sufficient testimony to create an issue for the jury that the Respondent Railroad Company was negligent in furnishing a defective switching appliance, which it might reasonably have foreseen would cause injury to a normal switchman? The Court of Appeals ruled that there was not.

IV.

SUMMARY OF ARGUMENT

It is our contention that no reasonable view of this evidence establishes any negligence on the part of the Respondent which contributed in whole or in part to the injuries allegedly suffered by the Petitioner; that there is no conflict with previous decisions of this Court or any other court; that this case raises no important issues for decision by the Supreme Court of the United States, creates no precedent and will result in no new concept as to the respective functions of court and jury.

V.

SUMMARY FACTUAL STATEMENT

Marion Edward Collins is a young white man, who at the time of his injury, September 27, 1954, was twenty-eight years of age. He was engaged as a switchman for the Atlantic Coast Line Railroad Company in its Florence yards. He was familiar with the lay-out of the railroad yards and was thoroughly familiar with the duties of a switchman and with the operation of the switch mechanism used to line up the tracks for the proper assembling or disassembling of trains.

In the course of his duties it was necessary for the switchman to throw what he called, "the main line switch No. 1",

and in order to carry out the switching movement engaged in at the time, he had to throw the switch lever from right to left in order to line the switch points to permit the shifting movement to proceed on Track No. 1, the main line. The switch lever was fastened near the ground by an appliance or catch which he released with his foot, whereupon he took hold of the switch lever or handle and raised it some eight (8) to ten (10) inches when, according to Petitioner's testimony, it *seemed to freeze.* He then states that he put down his lantern in order to use both hands to force it over, and when he brought it to an upright position, the lever froze again, and the pressure which he was exerting caused a stabbing pain in his back, and he fell to the ground.

Several of his co-workers came up in a few seconds, one of them threw the switch into proper position *without any difficulty;* and after completing the movement in which they were engaged, they put him upon the shifting engine and carried him to a point where he was transferred to the hospital.

A switch stand or switch mechanism is a relatively simple bit of machinery. What we term herein as a "switch lever" is merely a substantial iron or cast iron bar on the end of which there is a ball or oblong weight, which weight and bar when in position rests practically on the ground horizontal to the tracks. For example, when the switch lever or handle was thrown to the left and latched down, the switch in effect was inoperative as to Track No. 1, and a train movement would proceed past the switch along the main line. When the switch was thrown to the right, however, the traffic on the main line would be guided to the side track. In simpler language the switch does nothing more than control the connection between the main line and the side track.

There is one other feature that should be noticed which is important, and that is whether the switch is lined to the side track or to the main line, there is a latch on either side to

hold firm the lever which has placed the track in the position desired, for it is obvious that unless there is a stability in the contact point mechanism a derailment might occur.

It should be borne in mind that the occupation and duties of a railroad switchman are arduous and necessarily require the exercise of physical effort and some stress. The "tying" of brakes, the throwing of switch mechanisms, as a matter of common sense, do not warrant the furnishing and use of "finger tip control" instrumentalities.

There are certain fundamental features of the evidence that cannot be questioned.

1. It was the duty of Petitioner as well as the other yardmen to report anything irregular or unusual about the operation of a switch and though Petitioner had manipulated that particular one innumerable times, he had never considered it needed reporting (R.15); nor had the other witnesses (Neal, R.18, 4 and Bigelow R.45).

2. On the particular night of Petitioner's injury, he had already thrown this switch about twelve (12) times with no indication of any irregularity (R.11).

3. The switch was operated by the yardmen who remained on the job after Collins had gone to the hospital, and it operated normally and gave no trouble (Oakley R. 37, 38 and 40; Bigelow R. 43, 44; Eaton R. 48).

4. The Petitioner and the other witnesses stated that this switch was harder to "mash down", (as were others in the yard) when thrown from left to right than it was when thrown from right to left. It is significant to note that Collins was obviously manipulating from right to left, the easy way, and at any rate had not gotten the handle beyond a vertical position ninety degrees short of the position when the "mash down" should be applied so the catch at the bottom would hold it (R.37).

5. The uncontradicted evidence that this switch operated efficiently and satisfactorily, before and after *the one isolated instance* which Petitioner claims caused injury to his back, demonstrates clearly the speculative and ineffectual nature of the efforts to offer evidence that the switch was defective because of lack of lubrication.

There is no evidence that the switch points were "sprained", and there is no claim that in the manipulation of the switch Collins had progressed to the "latch down" phase. Furthermore, the evidence is clear that when the lever had reached that position, the operator would force it down with his foot (Oakley, R.47, 48; Bigelow R.44; Collins R.6, 15).

VI.

ARGUMENT

The Court of Appeals found that the sole question was whether there was sufficient evidence of negligence on the part of the Railroad Company to take the case to the jury. It was the conclusion of the Court that:

> "Upon consideration of the whole evidence it cannot be said that the plaintiff has offered sufficient testimony to show that his injuries were caused by the Railroad's neglect. His contention is that conflicts in the evidence required the submission of the case to the jury. There are, however, no conflicts upon the essential points in the inquiry. - - - In the last analysis, the plaintiff's case rests upon the contention that negligence on the part of the Railroad must be inferred from the mere happening of the incident."

The Petitioner pitches his application for a Writ of Certiorari on a contention that the case was properly submitted to the jury and that the decision of the Court of Appeals is in direct conflict with the principles of law previously an-

nounced by this Court. That is the point at which we differ. This Court has ruled in numerous cases that:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact - - in this case, the jury. Western & A. R. Co. v. Hughes, 278 US 496; 73 L ed 473, 49 S Ct 231, supra; Baltimore & O. R. Co. v. Groeger, 266 US 521, 524, 69 L ed 419, 45 S Ct 169. Cf Gunning v. Cooley, 281 US 90, 94, 74 L ed 720, 724, 50 S Ct 231; Marion County v. Clark, 94 US 278, 284, 24 L ed 59, 61. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims . . ." *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239.

This Court has frequently denied certiorari in Federal Employers' Liability Act Cases where the trial court or the court of appeals found no evidence to support a verdict for the plaintiff and directed entry of judgment in favor of the defendant railroad. See *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. 2d 996 (CA 3rd, 1947); Affirmed 335 U.S. 329, 93 L. Ed. 41. When the *Eckenrode* case was considered by this Court, the per curiam opinion affirming the decision below included this pertinent statement:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sus-

tain a recovery for her. Accordingly, the judgment is affirmed." 93 L. Ed. 42.

See also *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (CA 7th, 1948); Cert. denied 334 U.S. 845, 92 L. Ed. 1769; and *Healy* v. *Pennsylvania R. Co.*, 184 F. 2d 209 (CA 3rd, 1950); Cert. denied 340 U.S. 935, 95 L. Ed. 674; Reh. denied 341 U.S. 912, 95 L. Ed. 1348. In the latter case the jury found a verdict for the plaintiff upon which judgment was entered. The Court of Appeals reviewed and remanded with direction to enter judgment for defendant on the basis that there was "no adequate proof of any negligence on the part of the defendant company which contributed to the accident."

The facts in this case are not difficult or complicated. The Petitioner testified that on the night of his injury he had operated this same switch a dozen times between 4 and 7 o'clock P. M. without experiencing any difficulty. On the occasion of the injury, he raised the switch lever to a height of eight to ten inches from the ground when it "froze more or less . . . it stopped". At his direction, his fellow workmen operated the switch without difficulty immediately thereafter, and an examination made by the roadmaster that same night about 10 P.M. showed that the switch stand moved easily in either direction. The Respondent also introduced uncontradicted testimony to show that this switch was operated more than fifty times a day and that it was thrown fifteen or more times the same night without any alteration by other switchmen after the Petitioner claims to have been injured.

We submit the case at bar presents no evidence of negligence of the Railroad and assuredly, no evidence of negligence that operated as a proximate cause of Collins' injury, which, though suffered while he was engaged in the ordinary course of his work, could not have been foreseen and prevented. In view of the workability of the switch before and after the occurrence complained of, we submit it is reasonable

to assume that the switch lever did not "freeze" at all, but that an inherent defect in his spine which neither he nor the Railroad knew about, evidenced itself at the moment, causing him "to freeze". We believe the Court will take judicial notice of human experiences such as here suggested, where some inherent bodily frailty not known of before will evidence itself under ordinary circumstances such as turning around suddenly, of leaning over to pick up some minor thing, of reaching up for a book, or perhaps while one is inactive, or turning over in bed. There is no fixed pattern for disabling weaknesses of the human body to assert themselves.

Under the Federal Act, it is necessary for the Petitioner to show negligence on the part of the Railroad to be entitled to a recovery. It is almost unnecessary to cite authority that, "*under the Federal Employers' Liability Act, basis of recovery is negligence, not mere injury*"; and that such negligence must be a proximate cause. Furthermore, "*to find that negligence is proximate cause of injury, it must appear that injury was natural and probable consequence* of negligence or wrongful act and that it *ought to have been foreseen in light of attendant circumstances*", *Reynolds* v. *A. C. L. RR. Co.*, 196 F. 2d 643 (CA 5th, 1952); *Brady* v. *Sou. Ry. Co.*, 320 U.S. 476, 88 L. Ed. 239; *Milwaukee and St. P. R. Co.* v. *Kellogg*, 94 U.S. 469, 475, 24 L. Ed. 256, 259; *Sou. Ry. Co.* v. *Bell*, 114 F. 2d 341 (CA 4th, 1940); *Fore* v. *Sou. Ry. Co.*, 178 F. 2d 349, 353 (CA 4th, 1949).

Innumerable other authorities could be cited, but we submit that each of the foregoing is particularly applicable to the governing principles of this case.

While it is true that this Court has construed this Act liberally in a manner most generous to railroad employees, it has never gone so far as to hold that recovery may be had without evidence of negligence, or that negligence may be inferred from the mere fact that an accident occurred and an injury sustained.

The Court of Appeals decided as a matter of law that no inference of Railroad negligence could be drawn from the facts alleged in this case. Such a holding does not violate or conflict with any previous decision of this Court.

One of the principal cases relied on by Petitioner is *Louisville and N. R. Co.* v. *Botts*, 173 F. 2d 164, (CA 8th, 1949). This was a case brought under the Federal Employers' Liability Act, which charged a violation of Boiler Inspection Act, 45 USCA Sec. 22, et seq. The plaintiff, a switchman, lost a leg when he slipped off a footboard on the front of a moving switch engine and his claim was that the footboard was defective in violation of the Safety Appliance Act. The *Botts* case is clearly distinguishable on the facts from the instant case and moreover it involved an alleged violation of the Safety Appliance Act, a circumstance not present in this case.

We accept the argument of the Petitioner that: "If there are evidentiary facts, which, as a matter of law, consitute negligence, the jury's verdict and the district court's denial of judgment notwithstanding, the verdict should not be reversed on appeal by the Appellate Judges substituting their opinion of the facts and credibility of the witnesses for that of the jury . . .". *This is exactly what did not happen in this case.* The Court of Appeals held specifically that there was no evidence of negligence on the part of the Railroad; the Appellate Judges *did not* substitute their opinion of the facts for that of the jury but ruled that there were *no facts* which demonstrated negligence on the part of the Railroad, and hence no issue for submission to the jury.

The simple fact is that there is no conflict here with the previous decisions of this Court or with any other court. This case raises no important issues for decision by the Supreme Court of the United States, creates no precedent, and will result in no new concept as to the respective functions of a court and jury. The dissenting statement of Mr. Justice

Frankfurter in the very recent decision of this Court in *Joe Gibson, Petitioner,* v. *Phillips Petroleum Co.,* (decided Oct. 26, 1956), seems appropriate:

> "In taking one of these cases, encouragement doubtless is given to seek this Court's review in other like cases. But Congress sought to relieve this Court of the burden of such cases when it established the Courts of Appeals in 1891. This Court has respected the purpose of that enactment by stating again and again that it does not sit to correct errors, even a plain error, in a particular case, especially one involving a local controversy of this sort. The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measure in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court without being diverted by the correction of errors in local controversies turning on particular circumstances.
>
> "The Court's consideration of a case like this and the encouragement given for similar demands upon the Court are, in my deep conviction, so inimical to the effective discharge of the true functions of this Court that I cannot abstain from expressing my dissent from the Court's entertainment of the petition for certiorari."

One point made by the Petitioner is so grossly in error that it deserves special attention. In the petition it is argued that the decisions of this Court permit no distinction between cases brought under the Federal Employers' Liability Act and the Safety Appliance Act. There is a real and important distinction which has been recognized by this Court repeatedly. In the case of *Myers* v. *Reading Co.*, 91 L. Ed. 1615, 331 U.S. 477 the Court had before it whether there was sufficient probative evidence to support a verdict in favor of the plaintiff, who was injured allegedly because of defective hand

brakes on a freight car. Speaking for the Court, Mr. Justice Burton makes it emphatically clear that under the Safety Appliance Act it is only necessary to show a failure of the safety appliance to function in order to recover, but that in the Federal Employers' Liability Act the plaintiff must establish the negligence of his employer. The court says:

> " 'This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous.' Brady v. Terminal R. Asso. 303 US 10, 15, 82 L ed 614, 618, 58 S Ct 426, and cases there cited.
>
> "*This simplifies the issue beyond that presented in the ordinary case under the Federal Employers' Liability Act where the plaintiff must establish the negligence of his employer.* Here it is not necessary to find negligence. A railroad subject to the Safety Appliance Act may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an 'efficient' hand brake." (italics supplied)

Failure to distinguish between the Safety Appliance violation case and a negligence action under the Federal Employers' Liability Act was condemned by this Court in *O'Donnell* v. *Elgin, Joliet and E. R. Co.*, 338 U.S. 384, 94 L. Ed. 187 where it was said:

> "Notwithstanding this Court's efforts to distinguish the safety appliance violation case from the common law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. This non-negligence claim, based on a statutory violation, is pursued by action under the Fed-

eral Employers' Liability Act, basically a form of action predicated only upon negligence. The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action . . ."

VII.

REFUTATION OF WHAT PETITIONER CLAIMS TO BE "UNDISPUTED" IN THE RECORD OF THIS CASE

Petitioner contends (pp 8, 14) that:

(1). The Railroad had "knowledge of the stiff condition of the switches in the Florence yard (the condition of the switches having been discussed in safety meetings a year prior to the time plaintiff was injured) (R. 38-50)". This statement is not supported by the record. There was evidence of some variance in the operation of the switches. There is uniform testimony that because of tension in *latching down* the switches to hold the switch points firmly in the line desired, some switches were stiffer than others. Tension in the switchpoints is necessary to hold them snugly against the adjoining rail and prevent derailments, but the tension encountered here in "latching down the switch point" is completely irrelevant. It is the contention of Petitioner that he was straining to move the lever to the vertical or 90° position when his back failed. Oakley, a co-worker with Collins (p. 34-41) testified:

"Q. Well did you ever operate the same switch that Mr. Collins was injured at that night?
A. Yes sir.
Q. And did you find any trouble lining it up at all?
A. Only just throwing it to the right. It was a little hard **to latch down.**
Q. Was that unusual sir?
A. No sir.
Q. Was that a normal operating switch?
A. I would think it was" (R. 37-38).

This is fairly typical of this witness' testimony. There was nothing in this witness' testimony regarding any safety meeting protest.

C. L. Bigelow (R. 41-46) Typical of his testimony was the following:

"Q. Now sir, in pushing this switch down and pulling the switch up as Mr. Collins was doing, did you experience any difficulty in lifting that switch, sir?
A. Well, I didn't. In lifting it up, no.
Q. The only time you experienced difficulty was then in actually latching it down, is that right, sir?
A. That's right, sir. More or less putting your foot on it and pressing it down.
Q. Was that switch any more difficult to operate than the average switch in that yard, sir? (Tr. p. 85).
A. Well, I would say there is some just as hard to throw as that one was, or to latch down.
Q. Some of them are harder to throw?
A. Or just as hard, I will say.
Q. Are some of them easier to throw than that one?
A. Well, I would say some might be probably easier to latch down.
Q. All right, sir. How long have you worked for the railroad?
A. Since the 4th of February, 1942.
Q. Is it normal in a railroad yard for some switches to be a little more difficult or a little easier to work than others.
A. Well, I have found it that way." (R. 44-45).

As to complaints at safety meeting, he testified:

"Q. You said that this lead switch was about as hard to throw as some of the other switches there in the yard, did you not, or harder to throw than some?
A. Well, I didn't say it was harder. I said there was some just as hard to throw as that one was. I think that is the way I put it. (R. 45).
Q. And, at safety meetings, for as long as a year prior to this occurrence, there had been complaints made

about the switches being hard to throw out there in those yards, isn't that correct?

A. Well, I don't recall any special switch that might have been called to attention.

Q. You don't remember that subject having been taken up?

A. I would say no specific one.

Q. Not about the lead switch, but about other switches in the yard perhaps?

A. Well, I just don't recall that, Mr. Lewis, I really don't."

W. K. Eaton, switchman, replaced Collins on the job after he was hurt (R. 47-51). As to reports at safety meetings about switches. Eaton said it was a rule that if a switch is hard to throw, it should be reported (R. 50). He found nothing wrong with this particular switch which he threw fifteen (15) times or more during the remainder of the night after Collins hurt his back (R. 48).

W. H. Wideman, the roadmaster (R. 68-88) who investigated the switch very soon after the injury, stated he found no defects whatever and that no changes of any kind were made (R. 71, 88). He also testified that the switches were inspected and lubricated weekly.

Even if the wistful thinking interpretation placed upon the evidence by Petitioner could be sustained by the record, we cannot see how an occasional report of unspecified hard to throw switches on the Florence Division at an occasional safety meeting has the slightest significance here.

The allegation (2) that the *"undisputed" record shows the switch was hard to throw* is another exaggerated conclusion.

There is absolutely *no* evidence that this switch was ever *reported* as hard to throw or for any defective condition, and no unqualified evidence that it was in fact *hard to throw*. The evidence was that when operated from left to right, it was harder *to latch down* on that side. When Collins' back failed

him on this occasion the switch lever was being moved from a horizontal position toward the vertical and there is not even the remotest inference or implication that "latching down" the switch contributed to the injury.

Allegations (3) and (4) can be grouped together. In view of the proper performance of the switch immediately before and after Collins' back failed, and absence of any defective part therein, the only reasonable conclusion is that the cause of his injury was not stiffness in the switch, but stiffness in the spine. There is no question as to allegation (4) that "Collins on the night in question while at the switch in question sustained an injury to his back." It is also common practical knowledge and medical experience that often such latent spinal conditions evidence themselves without any provocation or strain.

In conclusion, the Respondent respectfully submits that the record does not present a case of actionable negligence against it; that the decision of the able United States Court of Appeals of the Fourth Circuit is correct, and prays this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Mr. Thomas J. Lewis, Jr., Attorney for Petitioner, 909 Healey Building, Atlanta 3, Georgia, and Mr. Robert K. Wise, of Counsel for Petitioner, 701 Barringer Building, Columbia, South Carolina, with a copy of this Brief in Opposition to Petition for Writ of Certiorari in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This the.....day of November, 1956.

.....

Counsel for Respondent

JAN 3 19
JOHN T. FEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 518

M. E. COLLINS,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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OCTOBER TERM, 1956

No. 518

M. E. COLLINS,

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ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner presents his petition for a rehearing of this Court's order dated December 10, 1956, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and in support thereof, respectfully shows:

Reasons for Granting Rehearing and Issuing the Writ

The court below erroneously based its decision reversing the District Court in this case upon the rule stated in *Baltimore & Ohio Railroad Co.* vs. *O'Neill,* (6 Cir.), 211 F (2d) 190, 194, from which it quotes (Appendix B 28). That decision which the court below used as a basis for reversing the District Court in this case was reversed in a per curiam decision of this Court on March 7, 1955, over a year before the decision of the court below was written. In 348 U. S.

956 this Court reversed the judgment of the Sixth Circuit Court of Appeals in the case of *Baltimore & O. R. Co.* vs. *O'Neill*, 211 F.(2d) 190 relied upon by the court below and remanded that case to the District Court with instructions to reinstate its order dated July 30, 1952.

It is clear from the opinion of the court below (Appendix B 28) that the Fourth Circuit Court of Appeals at the time it rendered its decision here sought to be reviewed and reversed, had overlooked the fact this Court had previously reversed the case of *Baltimore & O. R. Co.* vs. *O'Neill*, upon which it relied in deciding the instant case against petitioner.

For the same reason that prompted this Court to reverse the case of *Baltimore & O. R. Co.* vs. *O'Neill*, upon which case the court below relied in reaching its decision in the instant case, this Court is now urged to grant this motion for rehearing, issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit and upon such review such judgment be reversed and remanded to the District Court with instructions to reinstate the judgment, just as was done by this Court in *Baltimore & O. R. Co.* vs. *O'Neill* at 348 U. S. 956.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted.

WARREN E. MILLER,
Counsel for Petitioner.

Certificate of Counsel

I, Warren E. Miller, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the ground specified in Rule 58 subdivision 2, of the Rules of this Court.

WARREN E. MILLER,
Counsel for Petitioner.

(3160-9)